No. 84-1503

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHICAGO TEACHERS UNION, LOCAL NO. 1, AFT, *et al.*,
Petitioners,

v.

ANNIE LEE HUDSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF OF THE PETITIONERS AND THE RESPONDENTS SUPPORTING PETITIONERS

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ARGUMENT

A. Introduction

The brief of the individual respondents (hereinafter "respondents") seeks to defend the judgment of the court below without in any way defending (or even mentioning) that court's reasons for entering that judgment.[1] And to cover their tracks respondents excoriate the Union (and its officials) and the Board of Education (and its officials) (hereinafter collectively referred to as "petitioners")—who together oppose the judgment entered by the court below—for addressing that court's reasoning and for fail-

[1] Indeed, at various points in their brief, respondents even appear to request relief that goes beyond the judgment below. *See, e.g.*, Resp. Br. at 8 n.13 (attacking the constitutionality of the Illinois statute); *id.* at 34-38 (requesting this Court "to instruct the parties and the lower courts as to the criteria of . . . a [required] procedure"). Having failed to cross-petition, respondents' arguments in these regards are now inadmissible. *E.g., TWA v. Thurston*, —— U.S. ——, 53 L.W. 4024, 4026 n.14 (Jan. 8, 1985).

ing in our opening brief to anticipate and address the arguments respondents now press.

The court of appeals' rationale for invalidating petitioners' procedures for effecting proportionate share payments rests on the proposition that "forcing a public employee to support a union . . . deprive[s] him of 'liberty' within the meaning of the Fourteenth Amendment and therefore requires the employer to give him due process of law in the sense of fair procedure." App. A-6. That court went on to explain that the "liberty in question is freedom of association," and more particularly, the "negative . . . dimension" of that freedom, *viz.*, the " 'freedom not to associate.' " App. A-7. And the court of appeals concluded:

> True, freedom of association, whether positive or negative, is no more absolute than the other liberties that the due process clause protects against deprivation without due process of law. But the fact that it enjoys the procedural protections capsulized in the term "due process" means that the state cannot deprive an individual of his freedom of association by forcing him to support a union, except in accordance with procedures that reasonably assure that the deprivation will go no further than is necessary to prevent the individual from taking a free ride on an entity that . . . is providing services to him as his collective bargaining representative. [App. A-7 to A-8]

In opposing the petition for certiorari, respondents defended the judgment below on like grounds. Respondents claimed that the appellate court had

> faithfully followed *Abood* [*v. Detroit Board of Education*, 431 U.S. 209 (1977),] in holding that any proportionate share payment scheme infringes on non-union employees' "liberty" (specifically their First Amendment freedom of association) but that this infringement is constitutional if the union uses the payments to defray its collective bargaining expenses. The Court of Appeals then applied this substantive teaching of *Abood* to the procedural-due-process context, holding (unexceptionally) that the admitted deprivation of employees' "liberty" is constitutional only if the State has mandated procedures that guarantee that the payments will, in fact and law, subsidize the union's collective-bargaining activities alone. [Resp. Br. in Opp. at 5-6]

Given the court of appeals' theory and respondents' defense of that theory, in our opening brief we demonstrated that the deprivation of liberty with which the court below was concerned occurs, if at all, not as a result of the *collection* of proportionate share payments but as a result of the *expenditure* of those payments for certain purposes. We further demonstrated that petitioners' 100% escrow system necessarily assures that respondents will not be deprived of that liberty interest without due process because under petitioners' system the entirety of an objector's payment is placed in escrow and *before any expenditure of that money is permitted respondents have the right to a full evidentiary hearing* before either an arbitrator (pursuant to CTU's appeals procedure) or the state courts exercising their general jurisdiction. *See* Pet. Br. at 16-19.

Respondents' brief on the merits makes no attempt to respond to the analysis in our opening brief or to defend the reasoning of the court of appeals. Instead, respondents shift ground entirely, arguing that what triggers the application of due process here is *not* a threatened deprivation of "liberty"—*viz.*, a compelled association beyond that permitted by the Constitution—but rather a deprivation of property, *viz.*, the loss of the use of the money collected from the objector, a sum that cannot exceed $16.48 a month during the ten-month academic year. And respondents argue that while petitioners' procedures may suffice to protect respondents' rights of free speech and free association, the Constitution requires *far more* in the way of due process to adequately protect respondents' *property* rights. Respondents put the argument this way:

Because CTU might hold the "proportionate-share payments" in "escrow" until some court eventually determines how much CTU is entitled to spend, say the Board, and the CTU, "there is no risk that objectors will be deprived of their First Amendment liberty without Due Process." But precisely because the Board and CTU have garnished the monies from the teachers' wages and placed them in CTU's "escrow" account without a *pre*-garnishment hearing and then relegated the teachers to whatever redress a later state-court tort action may (or may not) provide, the "escrow" guarantees that the teachers are deprived of their property—the interim possession and use of their own wages—without due process. That is, *rather than obviating the "risk" of a due-process violation, the "escrow" constitutes that violation. That the "escrow" may theoretically forfend violations of the teachers' First Amendment rights is praiseworthy, but irrelevant* even if true in practice. For the right to procedural due process does not depend upon a deprivation of property also abiding the victims' First Amendment freedoms.

> [Resp. Br. at 29; emphasis on penultimate sentence added]

Since, according to respondents, their new-found theory —while not embraced by the court below—is "compellingly obvious[]," Resp. Br. at 13, it follows that our opening brief, addressed to the court of appeals' theory, "argues an imaginary case," *id.*, and is, indeed, "a coldly calculated study in misrepresentation," *id.* at 10.

Respondents' present theory is neither compelling nor obvious; rather, that theory is as insubstantial as the theory of the court below which respondents once championed and now rightly abandon.

B. The Agency Fee Precedents

At the threshold, it bears emphasis that respondents' present argument flies in the face of, and would uproot, fundamental principles established by this Court in its decisions involving the lawfulness of union security agreements.

For example, for almost twenty-five years, since *Machinists v. Street*, 367 U.S. 740, 771 (1961), it has been settled that "[r]estraining the collection of all funds from [objecting employees] sweeps too broadly" and "might well interfere with the . . . unions' performance of those functions and duties which the [labor laws] places upon them to attain its goal of stability." The Court reaffirmed that holding in *Railway Clerks v. Allen*, 373 U.S. 103, 110 (1963) ("an injunction relieving dissenting employees of all obligation to pay monies due under a [union security] agreement was impermissible"), and again in *Abood v. Detroit Board of Education*, 431 U.S. 209, 238 (1977). Yet the import of respondents' present argument is that if an objector invokes property rights rather than "merely" First Amendment rights a union is precluded from collecting even a single penny from that objector unless and until the union has "secure[d] the appropriate state agency's *certified final judgment* that the requested payments are lawful." Resp. Br. at 36 (emphasis added).[2]

Similarly, just two years ago, in *Ellis v. Railway Clerks*, —— U.S. ——, 52 L.W. 4499, 4501 (April 25, 1984), this Court, in holding that a union is not permitted to exact full union dues from objectors and then rebate the portion attributable to activities the objectors may not be required to support, concluded that there are "readily available" and "acceptable alternatives" to such a rebate approach, *"such as advance reduction of dues and/or interest bearing escrow accounts*, that place only the slightest additional burden, if any, on the union." Emphasis added. Yet respondents now maintain that

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[2] Respondents apparently would go even further, and require such a hearing and final judgment before a union may collect a proportionate share payment from *any* non-member, even one who has not made any objection. *See* Resp. Br. at 3. This, of course, effectively would overturn the Court's repeated holding that "dissent is not to be presumed—it must affirmatively be made known to the Union by the dissenting employee." *Street*, 367 U.S. at 774; *Allen*, 373 U.S. at 110; *Abood*, 431 U.S. at 238.

wherever an objector asserts a property right these procedures automatically cease to be constitutionally "acceptable." *See* Resp. Br. at 12-13 (discussing the foregoing portion of *Ellis*).

Respondents would avoid the force of this Court's union security cases from *Street* to *Ellis* on the ground that none of those cases "raise[d] a procedural-due process issue." Resp. Br. at 13. But that theory does not have even surface plausibility with regard to this Court's summary decision in *Threlkeld v. Robbinsdale Federation of Teachers*, 459 U.S. 802 (1982), *dismissing appeal from* 307 Minn. 976, 239 N.W. 2d 437 (1976) and 316 N.W.2d 551 (1982). In *Threlkeld* the very argument respondents make here was advanced and *rejected*. The "sole issue" before the court in *Threlkeld* was whether the Minnesota "'fair share' statute deprives an individual of property without providing procedural due process," 239 N.W.2d at 439. Plaintiffs argued there, as respondents argue here, that "an individual's wages are a 'specialized type of property' and that, under *Sniadach* [*v. Family Finance Corp.*, 395 U.S. 337 (1969)], an individual must be accorded a prior hearing before deductions may be made from his wages," *id.* at 442. The Minnesota Supreme Court rejected plaintiffs' contention as follows:

> A prior hearing is not the *sine qua non* of procedural due process since "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 610 (1984). Again, it must be stressed that the procedural protection to which the individual is constitutionally entitled depends on the balancing of the interests in each particular case. . . . As shown herein, the individual property interest in this case is of a much lesser magnitude than was involved in [*Sniadach* and its progeny] and the state's interest in the collection of the fair share fee is clearly more substantial . . . Consequently, since in the instant case the individual's interest is less significant and the state's interest is more substantial, the demands of procedural due process are correspondingly reduced. [*Id.* at 444-45]

The plaintiffs in *Threlkeld*—represented by the same counsel who represents respondents in the instant case—appealed to this Court, raising the procedural due process issue; the *Thelkeld* plaintiffs argued in their jurisdictional statement that "even if First Amendment freedoms are not involved, a seizure of property under color of statute without a prior hearing is unconstitutional under the Due Process Clause," J.S. No. 81-2403 at 19-20.[3] As noted, this Court dismissed that appeal for want of a substantial federal question.

As we proceed to show, the Minnesota Supreme Court's holding in *Threlkeld*, which this Court concluded did not so much as raise a substantial federal question, is as sound on full consideration as on summary consideration.

C. The Due Process Cases

1. What is most remarkable about respondents' extended exegesis into due process—and into the eleven "element[s]" that according to respondents are inherent in the concept of due process, Resp. Br. at 26—is the extent to which respondents systematically ignore this Court's teachings. For while respondents would distill due process into a set of fixed rules, "[i]t has been said so often by this Court and others as not to require citations of authority that due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Indeed, "[t]he very nature of due process negates any concept of

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[3] The plaintiffs in *Threlkeld* listed nine constitutional defects in the procedures at issue there, J.S. No. 81-2403 at 20; those nine defects are almost verbatim the same as defects 1-8 and 10 listed in their present submission, *see* Resp. Br. at 4-5. Apparently in the intervening five years counsel for respondents has discovered two additional requirements of due process.

inflexible procedures universally applicable to every imaginable situation," for due process, " 'unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' " *Cafeteria Workers v. McElroy*, 367 U.S. 886, 894 (1961).

Recognizing this—and recognizing, too, that "the interpretation and application of the Due Process Clause are intensely practical matters," *Goss v. Lopez*, 419 U.S. 565, 578 (1975)—the Court, in *Mathews v. Eldridge*, 424 U.S. 319 (1976), while eschewing a fixed mechanical formula, announced a flexible generalized method of approach for determining, in a particular case, what due process requires. The *Eldridge* Court held:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors. First, the private interest that will be affected by the official actions; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. [424 U.S. at 334]

In the ten years since *Eldridge* was decided, this Court has consistently followed this approach in due process cases, most recently at the close of last Term in *Walters v. National Association of Radiation Survivors*, —— U.S. ——, 53 L.W. 4947 (June 29, 1985), where the Court stated:

> Our decisions establish that "due process" is a flexible concept—that the processes required by the Clause with respect to the termination of a protected interest will vary depending upon the importance attached to the interest and the particular circumstances under which the deprivation may occur. In defining the process necessary to ensure "fundamental fairness" we have recognized that the Clause does not require that "the procedures used to guard against an erroneous deprivation . . . be so comprehensive as to preclude any possibility of error," and in addition we have emphasized that the marginal gains from affording an additional procedural safeguard often may be outweighed by the societal cost of providing such a safeguard. [53 L.W. at 4951-52.]

Respondents do not even mention—let alone treat with—the *Eldridge* analysis.[4] Instead, proceeding almost as if *Eldridge* had not been decided, and relying principally on pre-*Eldridge* cases, respondents assert that except in " 'extraordinary,' 'truly unusual,' and 'limited' instances," the " 'minimum procedural safeguards,' " required by due process "include[] a *pre*-deprivation hearing." Resp. Br. at 14, 15 (emphasis in original).

Respondents' assertion is not even a fair statement of the pre-*Eldridge* law; as this Court stated two years before *Eldridge*, "The usual rule has been '[w]here only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process if the opportunity given for ultimate judicial determination of liability is adequate.' " *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 611 (1974). And respondents' assertion is even wider of the mark with respect to the post-*Eldridge* cases, for those cases consistently "reject[] the proposition that 'at a meaningful time and in a meaningful manner' *always* requires the State to provide a hearing prior to the initial deprivation of property," and the post-*Eldridge* cases teach—or more precisely reaffirm—that "post-deprivation remedies made available by the State can satisfy the Due Process Clause." *Parratt v. Taylor*, 451 U.S. 527, 540, 538 (1981) (emphasis in original). Indeed, subsequent to *Eldridge* the Court, on at least six

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[4] Respondents not only fail to address, in terms, the *Eldridge* factors but actually reject the relevance of at least two of those factors in the course of their brief. *See* Resp. Br. at 13 (due process requirements not affected by fact that "interest in possession and use is arguably not 'weighty' "); *id.* at 29 ("due-process rights to a prior hearing do not depend on the likelihood that [the complaining party] will prevail at such a hearing").

occasions, has sustained the constitutionality of a post-deprivation hearing absent any predeprivation process. *Hewitt v. Helms*, 459 U.S. 460 (1983); *Parratt v. Taylor*, *supra*; *Mackey v. Montrym*, 443 U.S. 1 (1979); *Barry v. Barchi*, 443 U.S. 55 (1979); *Dixon v. Love*, 431 U.S. 105 (1977); *Ingraham v. Wright*, 430 U.S. 651 (1977).[5] "In only one case, *Goldberg v. Kelly*, 397 U.S. 284 (1970) has the Court required a full adversarial evidentiary hearing prior to adverse governmental action." *Cleveland Board of Education v. Loudermill*, —— U.S. ——, 53 L.W. 4306, 4309 (March 19, 1985).

With this background in mind, we turn to an analysis of the *Eldridge* factors as applied to the problem presented by this case. As we show, a review of those factors demonstrates how inapposite are the purely private wage-garnishment and replevin cases on which respondents principally rely, and establishes that in this case it is the "usual rule" stated in *Mitchell v. W.T. Grant Co.*, *supra*, that applies: " 'mere postponement of the judicial inquiry is not a denial of due process' " because " 'the opportunity given for ultimate judicial determination of liability is adequate.' " 416 U.S. at 611.

2. (a) *"The Private Interest."*—Simply stated, here, as in *Hewitt v. Helms*, *supra*, 459 U.S. at 473, "respondents' private interest is not one of great consequence."[5] What is at stake for these respondents—each of whom, as a teacher covered by the collective bargaining agreement negotiated by CTU earns from $13,770 to $36,236 per year, R. 45, Def. Ex 1, pp. 122-25—is the payment of $164.80 in proportionate share fees per year. Moreover, if, and to the extent that, respondents are wrongfully deprived of any part of that sum, respondents will receive the money back from the escrow fund in which the objecting employees' proportionate share payments

[5] *See also Miller v. Chicago*, 774 F.2d 188 (7th Cir. 1985), and *Brown v. Brienen*, 722 F.2d 360 (7th Cir. 1983) (Posner, J.).

are placed; thus, at most, respondents are deprived only of the temporary use of that money.

Even the foregoing overstates respondents' interest in this case. For although respondents pretend otherwise, there is no possibility that CTU is "entitled to no part of the seized wages." Resp. Br. at 12.[6] By operation of state law and the collective bargaining agreement between CTU and the Board, all members of the bargaining unit are legally obligated "to pay their proportionate share of the cost of the collective bargaining and contract administration measured by the amount of dues uniformly required by members." Thus, respondents may not be suffering any wrongful deprivation at all. At most, respondents' interest amounts to the temporary loss of the use of a *portion* of $16.48 per month during the 10-month academic year. And if it is determined that $16.48 per month is more than respondents' proportionate share of the cost of collective bargaining and contract administration, respondents will be compensated for the temporary lost use of whatever excess was collected from them through the payment of interest on that sum.

(b) *"The Risk of an Erroneous Deprivation."*—The second *Eldridge* factor concerns "the risk of an erroneous deprivation . . . through the procedures used, and the

[6] Respondents assert that the record does not establish "that any supposed 'benefits' the 'collective bargaining agreement and its administration' actually conferred on some or all 'employees in the bargaining unit' were such *constitutionally sanctioned* 'collective-bargaining benefits' as might support imposition of a "proportionate share payment on nonunion employees under the *Abood* doctrine." Resp. Br. at 2 (emphasis in original). This is sheer sophistry, as the district court's uncontested findings establish:

> All employees . . . whether or not members of the union, are fully covered by the terms of the collective bargaining agreement between CTU and the Board. Until December, 1982, the entire cost of collective bargaining and contract administration was underwritten by CTU members through their union dues. *Thus, those teachers and other employees within the bargaining unit who chose not to join CTU received the benefits of CTU's collective bargaining efforts* without contributing financially to the costs of such efforts. [App. A-26; emphasis added]

probable value, if any, of additional or substitute procedural safeguards." 424 U.S. at 334. For two independent reasons, the risk of an erroneous deprivation here does not place a heavy weight on the scales.

First, in "the generality of [agency fee] cases"—and *Eldridge* teaches that "procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exception," 424 U.S. at 344—the likelihood of an erroneous deprivation is small. In any year, before withholding of proportionate share payments begins, CTU makes a calculation of the proportion of its expenditures that in the immediately prior year were not devoted to "the collective bargaining process and contract administration," and makes a compensating *advance reduction* from its normal dues in fixing the proportionate share payment. The district court found that CTU's first year's calculation—the only calculation before the court—was based upon "a thorough analysis of [CTU's] financial records," App. A-51; was made "in good faith compliance with both the statute and [the] agreements with the Board," *id.*; and produced a "carefully documented" determination of the amount of the proportionate share payment, A-45.[7]

Moreover, as the district also found, the risk of error is appreciable only in the first year since in that year "many of CTU's basic judgments as to the political nature of certain expenditures are subject to challenge." App. A-52. Once those judgments are either affirmed or reversed—and a final determination is made as to what percentage of CTU's income was expended on collective

[7] Because the money of objectors is placed, *in toto*, in an interest-bearing escrow account, CTU has no conceivable incentive to seek too much from objectors; to the contrary, CTU's interest lies in avoiding litigation over the amount of the proportionate share payment which, if it were to occur, would delay the time at which CTU would be able to use respondents' money and would cost CTU more than the union would receive from objectors. Thus CTU has every reason to do a fair and noncontroversial calculation.

bargaining and contract administartion in the base year —"*the margin of error in fair share calculations should shrink to minimal dimensions in the future years*," *id.* (emphasis added), as all that will be required will be the application of settled rules and determination to CTU's financial records.[8]

Second, as the district court further found, to the extent any error occurs in calculating proportionate share payments—especially after the first year—"such errors should require only minor refinement of the fair share fee." App. A-51. This is because the Illinois legislature has provided an entirely rational benchmark—and a ceiling—for determining the amount of the proportionate share payments that an objector is required to make: such payments are to be "measured by the amount of dues uniformly required of members." As the court of appeals recognized, "most of the expenditures that a union makes are germane to its responsibilities in the collective bargaining process and thus do not violate the First Amendment even when the money expended comes in part from dissenting employees." App. A-5. This recognition accords with this Court's observation that performing the functions of an exclusive bargaining representative "entails the expenditure of considerable funds." *Street*, 367 U.S. at 760; *see also Abood*, 431 U.S. at 221.

Thus, in the generality of cases, the procedure here offers "substantial assurance that the [objector's] inter-

[8] In the first year of the proportionate share agreement, nonmembers were not required to make proportionate share payments for the first three months as CTU, prior to implementing the proportionate share payment requirement, provided notice of, and information about, the proportionate payment system to the employees in the bargaining unit. Consequently, objectors ultimately paid 70% of dues for that first year, even though CTU calculated that over 95% of its expenditures were for activities germane to collective bargaining. *See* R. 45, Stipulation of Facts ¶ 20. This leaves a substantial margain for error to have occurred without causing any injury to respondents.

est is not being baselessly compromised." *Barry v. Barchi*, *supra*, 443 U.S. at 65.[9]

(c) *"The Government's Interest."*—Weighted against the minimal private property interest at stake here (and the at least equally small risk of an erroneous deprivation of even that minimal interest) is the government's interest in "the function involved." *Eldridge*, 424 U.S. at

[9] Of course, whether CTU erred in the first-year determinations made in fixing the amount of the proportionate share payment (and if so to what extent) ultimately will depend on how narrowly or broadly the Illinois courts define the category of expenditures for which unions may, under the Illinois statute, charge objecting employees, and how narrowly or broadly this Court draws the constitutional limitations on the activities towards which objectors may be required to contribute. Because we do not believe that the resolution of the procedural due process issue posed here is in any way dependent upon the decision of those substantive issues—and because the Court does not have the benefit of a state-court determination with respect to the threshold issues of state law—we do not think it necessary or appropriate for the Court in this case to address further the 'difficult problems in drawing [constitutional] lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining for which such compulsion is prohibited." *Abood*, 431 U.S. at 236. Nonetheless, we feel compelled to note our response to respondents' argument with respect to that issue.

Respondents assert that objectors have a constitutional privilege not to contribute to non-political, non-ideological union activities unrelated to collective bargaining because the "governmental interest that this Court says justifies . . . forced payment of 'fair share fees' is . . . only an interest in reimbursing unions for demonstrably 'collective-bargaining services," Resp. Br. at 12 n.19; this was the lower court's view as well, App. A-8 to A-9. But as we explained in our opening brief at 15 n.9, *Ellis* teaches, logically enough, that the question of "governmental interest" arises only after it has been shown that a compelled contribution for a particular activity implicates an "*additional* interference with the First Amendment interests of objecting employees," beyond the interference "already countenanced." 52 L.W. at 4504 (emphasis added). By definition, compelled support for non-political, non-ideological union activity does *not* implicate such an interest—the objectors' only complaint is that it is *union* activities the objector is required to support, *see id.*—and thus there is no First Amendment privilege to refuse to contribute to such activities.

334. That interest has been clearly identified in the decisions of this Court: it is nothing less than the "governmental interest in industrial peace," *Ellis*, 52 L.W. at 4504.

That governmental interest would be gravely undermined if, as respondents urge, CTU and the Board could not begin to collect proportionate-share payments from objectors until after the Board has "secure[d] the appropriate state agency's final judgment that the requested payments are lawful." Resp. Br. at 36.[10] Such a rule would mean that until a "final judgment" is secured objectors would be able to take a "free ride" on their fellow employees. During the period of that free ride—and the period could be considerable because deferring the collection of proportionate share payments would create an "incentive to delay," *Mackay v. Montrym*, *supra*, 443 U.S. at 18, on the part of objectors—the state's fundamental purpose in requiring proportionate-share payments, namely to alleviate the tensions and hostilities among employees that free-ridership inevitably engenders, would be completely frustrated.

Precluding the collection of proportionate share payments until after a final judgment is obtained could disrupt the governmental interests in other ways as well. Such a rule "might well interfere with the . . . unions' performance of those functions and duties which the [labor law] places upon them to attain its goal of stability in the industry," *Street*, 367 U.S. at 771; *see also Allen*, 373 U.S. at 110 ("the important function of labor organizations . . . [could] be unduly impaired"). And precluding collection of proportionate share payments *pendente lite* would increase the financial burdens placed on non-objectors during that period and thereby would deprive "union

[10] Even respondents now concede that, contrary to the decision of the court below, App. A-12 to A-13, "the Board is obviously *not* a suitable state agency to hold hearings on the validity of 'proportionate-share payments.'" Resp. Br. at 34 (emphasis in original); *see* Pet. Br. at 23-24.

members who do wish part of their dues to be used for political purposes" of their right "to associate to that end." *Abood*, 431 U.S. at 238.[11]

This Court has made clear that these are "important government interests," *Abood*, 431 U.S. at 225; indeed, they are sufficiently weighty to justify "a significant infringement on First Amendment rights," *Ellis*, 52 L.W.

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[11] Respondents argue that because CTU has chosen to provide objectors complete protection against any conceivable misuse of their money by escrowing 100% of the proportionate share payments from objectors *pendente lite*, there is no difference, from CTU's vantage point, between requiring a pre-collection and a post-collection hearing because in either case CTU does not gain the use of any of the objectors' money until after the hearing is completed. But permitting collection of proportionate share payments into an escrow account *pendente lite* assures that objectors will not be perceived as taking a free ride during the litigation period. Such collection also minimizes the "incentive to delay" objectors would have if there were no payment obligation until all hearings were concluded. And permitting pre-hearing collection guarantees that the objectors' money eventually will be available to CTU to the extent found permissible. In contrast, if collection were precluded until after a "final judgment" were obtained, CTU would then have to attempt to collect accrued debts, including debts from teachers who had left the employ of the School Board, once the amount of CTU's entitlement were determined.

Moreover, as already noted, due process rules are shaped by the "generality of cases, not the rare exception." P. 12 *supra*. In most cases, unions do not escrow 100% of proportionate share payments but escrow a lesser percentage tailored to a (generous) estimate of the proportion of union expenditures on activities that objectors cannot be required to support. *See* Pet. Br. at 24-28; Br. of the National Education Association As *Amicus Curiae* at 11-14. In such cases, a rule that precluded any collection until after all hearings were completed would directly interfere with the union's ability to expend objectors' funds for activities germane to collective bargaining. And it would be ironic, indeed, to hold that by proceeding with an abundance of caution at the outset and initially establishing the escrow amount at 100%, CTU became obligated to provide hearings before collecting any money from objectors, whereas had CTU adopted a system which allowed for immediate expenditure of a portion of objectors' monies, prehearing collection would have been permitted.

at 4504, *viz.*, to justify requiring objectors to support financially the collective bargaining activities of their bargaining representative notwithstanding the objectors' constitutional interest in refraining from such association. The Court has likewise made clear that although objectors do have a constitutional privilege not to support political or ideological activities unrelated to collective bargaining, protecting the governmental interests at stake requires that objectors "can be entitled to no relief until after final judgment in their favor is entered," *Allen*, 373 U.S. at 110. *See also Street*, 367 U.S. at 771. It follows *a fortiori* that the same governmental interests that outweigh these vital First Amendment concerns are substantial enough to outweigh respondents' relatively minor interest in not being temporarily deprived of the use of a relatively small sum of money, much—and perhaps all—of which, respondents are obligated to pay to the union in any event. In short, there can be no justification for precluding the collection of proportionate share payments until after a state agency renders "final judgment that the requested payments are lawful." P. 15 *supra*.

Nor do respondents here seek any lesser form of preliminary predeprivation process. In some—but by no means all—other contexts this Court has required preliminary process as an "initial check against mistaken decisions." *Cleveland Board of Education v. Loudermill*, *supra*, 53 L.W. at 4309.[12] But in those cases, the point of the preliminary process was to afford the property-holder an opportunity to "explain his version of the facts," *Goss v. Lopez*, *supra*, 419 U.S. at 382, in situations where the decision whether to terminate the individual's property interest would be based on the resolution of potentially conflicting accounts of a past event. Here, in contrast, the point of the process respondents seek is not to present evidence within their personal

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[12] *See also, e.g., Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1978); *Morrisey v. Brewer*, *supra*; *North Georgia Finishing, Inc. v. Di-Chem Inc.*, 419 U.S. 601 (1975).

knowledge; respondents concede that "the only complete source of evidence" is the "officials, employees and organizational records of the CTU and its affiliates," Resp. Br. at 33. Rather respondents seek a hearing to test CTU's legal determinations as to which of its activities are germane to collective bargaining and which are not, and to test CTU's factual determination of the costs attributable to the germane activities. Thus, here, as in the numerous other instances in which the Court has held that predeprivation process is not required, *see* pp. 9-10 *supra*, the complaining party's claims are not ones that lend themselves to sensible exploration and resolution through an informal preliminary hearing, and requiring a full-fledged evidentiary hearing prior to the deprivation would gravely undermine the important governmental interests at stake in a way not justified by the minimal private interest involved.[13]

3. All of the foregoing considerations serve to distinguish the instant case from the cases on which respondents rely, principally *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), and *Fuentes v. Shevin*, 407 U.S. 67 (1972).

First, those cases—unlike this one—involved weighty private interests; *Sniadach*, for example, concerned a prejudgment garnishment in an amount equal to almost

[13] In arguing that the informal processes required in *Loudermill et al.*, do not make sense here, we hasten to add that we do not in any way endorse respondents' extravagant suggestion that what due process requires in this context is a hearing that is tantamount to a rate-making hearing of the type required by various federal statutes. *See* Resp. Br. at 36-38. Nothing in this Court's due process jurisprudence remotely supports that suggestion. And in its agency-fee cases, the Court has squarely held that "[a]bsolute precision . . . is not . . . to be expected" given "the difficult accounting problems that may arise." *Allen*, 373 U.S. at 122; *see also Abood*, 431 U.S. at 239-40 n.40. Indeed, the litigation costs of the type of rulemaking procedures respondents espouse would greatly dwarf the size of the proportionate share payments and ultimately would destroy the proportionate fee system, to respondents obvious delight but to the detriment of the governmental interests at stake.

seven weeks of wages. As the Court recognized, such garnishment "may as a practical matter drive a wage-earning family to the wall." 395 U.S. at 341-42.

Second, the risk of error in those cases likewise was high; in each the alleged debtor had potentially dispositive defenses and, indeed it was possible—in the *Sniadach* Court's view common—for fraudulent claims to be filed by supposed creditors. *See id.* at 341. That could occur in *Sniadach* and *Fuentes* because the alleged debt on which the garnishment or replevin was based resulted from a process to which the state was not a party. In contrast, here the obligation of objectors to make proportionate share payments is created by state law and by a collective bargaining agreement to which the Board is a party; the state law itself places a limit on the payment; and there is no doubt that respondents have an obligation to pay most if not all of what is being required of them.

Finally in *Sniadach* and *Fuentes*, precisely because what was involved was the collection of a private debt, the government had little if any independent interest in effecting a taking without any prehearing process. Here, in contrast, there is a strong interest in seeing to it that the obligations the government itself has created are satisfied; that governmental interest can be protected only by permitting pre-hearing collection.[14]

For all these reasons it is not *Sniadach* and *Fuentes* but *Eldridge* and its progeny that are controlling here. And *Eldridge* teaches that the procedures followed in this case in effecting the proportionate share payments meet the Constitution's due process requirements.

[14] Respondents thus defy this Court's repeated holdings in asserting that "the governmental interest in [proportionate share] payments (whatever it may be) does not significantly exceed the government's general interest in effectuating the collection of private creditors' valid claims from their private debtors." Resp. Br. at 32 n.68. Respondents' refusal to accept the significance of the governmental interests at stake is alone sufficient to impeach respondents' entire due-process analysis.

CONCLUSION

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded to that court with instructions to affirm the district court's judgment dismissing the complaint.

Respectfully submitted,

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